

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM STOUT

Claimant

VS.

JOHNSON COUNTY & BD. OF COMMISSIONERS

Self-Insured Respondent

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Docket No. 1,050,525

ORDER

Claimant requested review of the August 10, 2012, Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on December 14, 2012.

APPEARANCES

Michael R. Wallace, of Shawnee Mission, Kansas, appeared for the claimant. Eric T. Lanham, of Kansas City, Kansas, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, at oral argument to the Board, the parties stipulated that the record supported a finding that claimant suffered a 77 percent task loss and a 100 percent wage loss with a resulting 88.5 percent permanent partial general (work) disability. If the Board determines that claimant is entitled to a permanent partial whole body general disability, those numbers will be utilized in calculating the appropriate award.

ISSUES

The Administrative Law Judge (ALJ) found claimant was entitled to a 25 percent permanent partial disability to the left leg at the knee and 13.29 weeks temporary total disability benefits (TTD). He opined that although claimant experiences some low back pain and stiffness with certain activities, it is not physically disabling and thus, limited the permanent impairment to the left leg. He also found claimant entitled to \$406.01 in medical mileage. The ALJ denied respondent's request for a credit for retirement benefits, having determined that the benefits claimant is receiving from respondent are not for retirement. He further denied respondent's request for a credit for unearned wages as

claimant was not working and there were no wages to deduct. Finally, the ALJ declined to award future medical treatment, instead instructing claimant to submit any request for future medical treatment as a post-award claim.

Claimant argues that he is entitled to a work disability for his low back and left hip conditions as they are related to the altered gait from his left knee injury. Claimant contends that the ALJ erred in his reliance on Dr. Wheeler's opinion, as he suffers continuing and ongoing low back and left hip symptoms. Claimant argues that the Board should modify the ALJ's decision and enter an award providing for an 88.5 percent permanent partial general disability to the body as a whole.

Respondent argues that the Award should be affirmed.

FINDINGS OF FACT

Claimant's career in law enforcement began in 1998. Claimant worked for the sheriff's office in Johnson County for 10 years. On April 15, 2010, claimant was injured during corps training involving defense tactics and ground fighting. Claimant had been matched with another co-worker and was on all fours attempting to escape the co-worker's grasp when he was pulled backwards. His left leg and knee were caught under him and he fell backwards. He noticed a loud pop and felt extreme pain in his left leg/knee.¹

Claimant reported the incident to his employer and the training officer took him to Corporate Care for an examination. Claimant was examined by Dr. Robert Brown and was referred to Dr. Daniel Stechschulte, an orthopaedic surgeon. Claimant continued to have problems after treating with Dr. Stechschulte. Claimant's treatment with Dr. Stechschulte included reconstructive knee surgery on May 19, 2010. Claimant returned to work after surgery on July 19, 2010, on limited duty, answering phones in the control center and opening and closing the doors in the jail facility.

Post surgery, claimant began to notice some minor pain in his back. Claimant's low back symptoms began in the middle or end of July 2011. He informed respondent on August 2, 2011. He attributed the back pain to the limp he had developed and to sitting for extended periods of time. Claimant reported this back pain to his employer and was again sent to Corporate Care and referred for physical therapy. Claimant was later referred to board certified physical medicine and rehabilitation specialist Eden Wheeler, M.D. Dr. Wheeler discussed with claimant the possibility of injections for the back pain. Claimant testified he was told the best way to relieve his back pain was to have his knee replaced, which would fix his altered gait. Claimant has not worked for the sheriff's department since September 2011. He was forced to take disability retirement

¹ R.H. Trans. at 5-6.

through the Kansas Public Employees Retirement System (KPERS), as respondent was not willing to accommodate his permanent restrictions.

Claimant has limited of range of motion in his left knee and atrophy in the left thigh. He wears a knee brace all of the time. He testified that prolonged standing and walking for long distances, along with weather changes, increases the pain and swelling in his knee. Claimant also complains of stiffness in his back, especially in the morning and pain in his left hip, especially when pressure is applied. The hip pain causes problems for claimant as he is a side sleeper.

Claimant has been able to perform some household chores such as cleaning, dusting, vacuuming and some computer work. Claimant testified Dr. Stechschulte told him he could work as long as it was a sedentary position in which he could get up and walk around as needed to control the pain.²

Dr. Eden Wheeler, testified that 90 percent of her practice involves providing treatment, with the rest involving independent medical examinations (IMEs) or second opinions. She testified that she initially met with claimant on September 8, 2011, for his back. Dr. Wheeler testified that claimant had an extensive history of treatment involving his left knee from an initial injury on April 15, 2010. She noted that claimant had surgery with Dr. Stechschulte to treat the knee, but did not have the best outcome as it left claimant with persistent pain and instability issues, and by July 2011 claimant was complaining of back pain. Dr. Wheeler is unsure when claimant's back complaints began.

Dr. Wheeler felt claimant would benefit from therapy for the knee and injections and therapy for the back. Claimant declined the injections, instead going the conservative route with his treatment. Dr. Wheeler felt that the restrictions of Dr. Stechschulte were adequate to accommodate claimant's back complaints and assigned nothing additional. Dr. Wheeler testified that claimant received some improvement in his mobility from medication and therapy, but no improvement of the pain.

Dr. Wheeler met with claimant again on October 5, 2011, the focus was on a four week home exercise program and a return to physical therapy. By this exam, claimant's hip pain had resolved. On November 9, 2011, claimant reported improvement in his range of motion. But, there had been no significant impact on his back pain.³ Dr. Wheeler felt that claimant had maximized conservative treatment for his back and felt claimant was going to need to continue to do exercises to keep his core strong. Dr. Wheeler believes

² *Id.* at 20.

³ Wheeler Depo. at 9.

that claimant's back pain is related to his knee pain, opining that a brace can change body mechanics and can lead to an altered gait, which could result in back or SI joint issues.⁴

Dr. Wheeler was asked to address what, if any, permanent impairment claimant had to his low back as the result of the altered gait. She determined, pursuant to the AMA Guides 4th ed.⁵ that claimant fell within the parameters of DRE category I, which resulted in no permanent impairment to claimant's back. Claimant had no clinical radiculopathy from the back complaints and his lumbar spine range of motion was good.

At the request of his attorney, claimant met with board certified orthopedic surgeon Edward J. Prostic, M.D., on July 18, 2011. Claimant reported complaints of frequent pain in his left knee anterolaterally, with the pain being worse with progressive standing, walking, going up or down stairs, walking on uneven surfaces, or attempting to squat, kneel, run or jump. Claimant continued to have swelling, clicking, popping and giving way. Claimant also reported instability on stairs when not using his brace.

Dr. Prostic examined claimant and opined that claimant's left knee injury occurred during the course of his employment and required an ACL reconstruction, partial lateral meniscectomy, and microfracture. Dr. Prostic noted claimant's continued thigh atrophy and recommended he continue with his efforts at hamstring stretching and rebuilding his quadriceps. Dr. Prostic's July 18, 2011, report did not mention an altered gait or low back pain. Dr. Prostic noted Dr. Stechschulte's permanent restrictions of desk work or sedentary work only with the ability to alternate sitting and standing as needed for pain.

In a separate letter dated August 9, 2011, Dr. Prostic reported claimant had a 25 percent permanent partial impairment to the left lower extremity. Dr. Prostic did not assign restrictions at that time because this was an extremity injury for which restrictions wouldn't matter.⁶

On January 13, 2012, claimant met with Dr. Prostic for reevaluation. Dr. Prostic noted that claimant denied any new medical problems or additional injuries since the initial July 18, 2011, evaluation. But Dr. Prostic noted that claimant had developed low back pain from an altered gait and prolonged sitting in August 2011. Claimant was also having difficulty with his left hip. The physical exam failed to note range of motion limitations in the low back. Claimant displayed no neurological deficits in either leg and had a negative straight leg raise maneuver.

⁴ *Id.* at 13.

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

⁶ Prostic Depo. at 17.

Dr. Prostic continued to be of the opinion that claimant sustained injury to his left lower extremity on April 15, 2010, and from an altered gait and prolonged sitting, aggravated his low back. He recommended conservative care for the hip and low back pain. He assigned a 25 percent permanent partial impairment to the left lower extremity and a 5 percent whole body impairment for the lumbar spine. He combined the two impairments for a 15 percent whole body impairment on a functional basis.⁷ Dr. Prostic utilized the AMA Guides, 4th ed. in reaching his impairment opinion.

Dr. Prostic also opined that claimant was unable to return to work that requires restraining suspects, lifting weights greater than 35 pounds knee to shoulder occasionally, or prolonged standing. He also limited claimant's stair climbing, squatting and kneeling. He opined that at some point claimant would need additional treatment to the left knee as claimant is at markedly increased risk of post-traumatic osteoarthritis.⁸

Claimant met with Michael Dreiling, a vocational consultant, on February 21, 2012. Mr. Dreiling obtained claimant's work history over the last 15 years and identified 26 tasks claimant had performed during that time. Out of 26 tasks on Mr. Dreiling's list, Dr. Prostic found claimant could no longer perform 20, for a 77 percent task loss.⁹

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹⁰

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.¹¹

K.S.A. 2000 Furse 44-510e(a) defines functional impairment as,

. . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

⁷ *Id.*, Ex. 3 at 2 (Jan. 13, 2012 report).

⁸ *Id.*, Ex. 3 at 2 (Jan. 13, 2012 report).

⁹ *Id.*, Ex. 4 at 1 (Task List).

¹⁰ K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

¹¹ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

K.S.A. 2000 Furse 44-510d(b) states:

(c) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i, and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

The ALJ determined that claimant's permanent impairment was limited to his left lower extremity. The Board agrees. Dr. Wheeler found no justification under the AMA Guides, 4th ed. to award permanent impairment to claimant for his low back symptoms. Claimant had no limitation in his range of motion, nor did he have clinical radiculopathy to justify a permanent low back rating.

The physical exam with Dr. Prostic failed to note range of motion limitations in the low back, displayed no neurological deficits in either leg and had a negative straight leg raise maneuver.

Neither examination generated the findings necessary to qualify for DRE II under the AMA Guides, 4th ed. Thus, the finding by Dr. Wheeler that claimant had suffered no permanent impairment to his low back is the most persuasive in this record. The Award limits claimant to a functional impairment to his left lower extremity. The Board agrees and affirms this finding. As noted in the Award, Dr. Prostic provided the only functional impairment opinion for the left lower extremity, 25 percent.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed. Claimant failed to prove that he suffered permanent impairment to his low back. Therefore, his award is limited to the left lower extremity. The adoption in the award by the ALJ of Dr. Prostic's 25 percent functional impairment to the left lower extremity is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated August 10, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge